IRRIGATION ASPECTS OF FRYINGPAN-ARKANSAS PROJECT

The principal objectives of the Fryingpan-Arkansas Project are the maximum conservation of the native water of the Arkansas River above John Martin Reservoir, the importation of water to supplement the native supply, and the most beneficial use of these waters for irrigation, municipal and industrial supply, and power production. Plans for the accomplishment of these objectives were developed with the full cooperation and concurrence of the water users in the Arkansas Valley. The operating criteria and procedures so established form the basis for the engineering plans and economic and financial feasibility of the project. They also provide a framework for the future negotiation of repayment contracts and formal agreements for operation of the project, and distribution of water.

The following discussion is presented to clarify the basic principles and operating procedures which guides the formulation of plans for irrigation and other functions of the project.

Irrigation Water Supply

The water supply for irrigation is defined as (1) supplemental or new water made available by importation or conservation of surplus native flows; (2) water made available for more efficient or beneficial use through improved regulation of existing supplies; and (3) municipal water return flows, reuse of irrigation return flows, and salvage of reservoir spills.

Source of Supplemental Water Supplies

Fryingpan-Arkansas Project Imports.--Importations from the upper Fryingpan River watershed to the Arkansas River watershed will average 69,100 acre-feet annually based on 1911-1957 studies. This import is exclusive of the Busk-Ivanhoe or other existing diversions.

Arkansas River Floods.--Flood flows originating in the Arkansas River watershed above Pueblo Reservoir will be stored to the limit of available storage capacity at such time as John Martin Reservoir is full and spilling. Although such flood flows are unpredictable and relatively infrequent the gross amount of water stored by the project would average 19,100 acre-feet annually for the 1911-1957 period.

Municipal Water Return Flows.--From the imported water and storable flood flows mentioned above, 20,500 acre-feet annually will be earmarked for delivery to the municipalities. Gross return flows from water diverted for municipal uses are relatively high; it is estimated that they will average 7,300 acre-feet in the Arkansas River and 7,000 acre-feet in the Fountain River. These return flows would be available for irrigation.
Additional Imports by Twin Lakes Company.--The project will enable the Twin Lakes Company to increase the amount of water which it can divert from the Roaring Fork watershed under presently decreed water rights. The gross average annual increased in the company's diversion would amount to 14,200 acre-feet. This water, owned by the Twin Lakes Company, would be regulated in the project's reservoirs and delivered to the Company on demand.

Arkansas River Winter Flows.—Through cooperative endeavor of irrigators holding diversion rights from the Arkansas River below Pueblo Reservoir, water historically diverted for winter irrigation will be stored in Pueblo Reservoir for release during the growing season. This will result in more efficient and beneficial use of water supplies. The average annual gross amount of winter water available for storage would be 88,600 acre-feet.

The matter of storage of winter water was thoroughly discussed with water user groups in the Arkansas Valley between Pueblo and John Martin Reservoir. The following motion was carried by unanimous vote at a meeting held on February 22, 1949 at Rocky Ford. The Catlin, Highline, Rocky Ford, Holbrook, and Bessemer Ditch and Canal Companies were represented at the meeting by their boards of directors.

"That this entire group express a willingness and a desire to give full consideration to the proposal that the Ditch Companies between the Pueblo Reservoir and the John Martin Reservoir enter into agreements whereby the historical winter diversions (November to April 1) of the Ditches in this area be held in the Pueblo Reservoir subject to call the following irrigation season, the water to be either earmarked or divided proportionately based on the interests of the various Ditches, some winter diversions in the intervening area to be continued on account of the water passing Pueblo and the return flow, all of which creates surface flow below the Pueblo Reservoir site."

Similar motions were passed by the Fort Lyon Canal Company on March 3, 1949 and by the Twin Lakes Reservoir and Canal Company on March 2, 1949. The companies approving these actions represent over 90 percent of the irrigated land in the project area below Pueblo Reservoir.

Irrigation Return Flows and Salvaged Reservoir Spills.—The irrigable lands and diversion works in the Arkansas River are so located that the use and reuse of irrigation water supplies is possible. It has been estimated that 1.4 times the amount of irrigation water released from Pueblo Reservoir will be available at the canal headgates in the project area.
In the operation of Pueblo Reservoir it will be necessary at times to evacuate storage capacity to permit control of anticipated floods. The water released under such conditions (controlled spills) can, to a large extent, be rediverted for storage in the various plains reservoir for use in the project area or stored in John Martin Reservoir. This salvage of reservoir spills in plains storage will contribute materially to the total headgate supply.

Summary Table.—The attached table, "Water Available for Irrigation Use in Arkansas Valley as a result of the Fryingpan-Arkansas Project" summarizes the origin and ultimate use of the supplemental irrigation water made possible by the Fryingpan-Arkansas Project.
<table>
<thead>
<tr>
<th>Item</th>
<th>Gross water</th>
<th>Spills 1/</th>
<th>Levee transportation</th>
<th>Reservoir evaporation 1/</th>
<th>Irrigation water at Isabella Reservoir</th>
<th>New basinette supply for project lands 2/</th>
<th>Additional new basinette supply for main basin project area 3/</th>
<th>Total new basinette supply</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project imports 4/</td>
<td>69.1</td>
<td>--</td>
<td>7.5</td>
<td>5.3</td>
<td>55.3</td>
<td>13.7</td>
<td>20.5</td>
<td>95.8</td>
</tr>
<tr>
<td>Decennial Antelope River floods 5/</td>
<td>19.1</td>
<td>6.1</td>
<td>--</td>
<td>1.3</td>
<td>13.7</td>
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</tr>
<tr>
<td>C.P.A. industrial water 6/</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>50.5</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Municipal water 7/</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>20.5</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Subtotal</td>
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<td>6.6</td>
<td>69.5</td>
<td>69.3</td>
<td>5.0</td>
<td>74.3</td>
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<tr>
<td>Decennial water returns Antelope River 8/</td>
<td>7.3</td>
<td>3.1</td>
<td>--</td>
<td>--</td>
<td>4.2</td>
<td>5.0</td>
<td>0.4</td>
<td>6.7</td>
</tr>
<tr>
<td>Additional Pueblo Diversions 9/</td>
<td>18.2</td>
<td>--</td>
<td>1.3</td>
<td>1.1</td>
<td>11.0</td>
<td>15.5</td>
<td>1.2</td>
<td>17.7</td>
</tr>
<tr>
<td>Winter flows - Antelope River 9/</td>
<td>23.6</td>
<td>16.4</td>
<td>--</td>
<td>6.3</td>
<td>65.9</td>
<td>65.9</td>
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<td>65.9</td>
</tr>
<tr>
<td>Subtotal - Antelope Valley</td>
<td>177.0</td>
<td>23.6</td>
<td>8.8</td>
<td>14.0</td>
<td>131.4</td>
<td>157.5</td>
<td>6.6</td>
<td>164.1</td>
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<tr>
<td>Municipal water returns Antelope River 10/</td>
<td>7.0</td>
<td>3.0</td>
<td>--</td>
<td>--</td>
<td>4.0</td>
<td>5.6</td>
<td>0.4</td>
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<tr>
<td>Total water supply in project area</td>
<td>184.0</td>
<td>26.6</td>
<td>8.8</td>
<td>14.0</td>
<td>135.4</td>
<td>163.1</td>
<td>7.0</td>
<td>170.1</td>
</tr>
<tr>
<td>Spills</td>
<td>--</td>
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<td>--</td>
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<td>22.5</td>
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<td>22.5</td>
</tr>
<tr>
<td>Gross total</td>
<td>184.0</td>
<td>26.6</td>
<td>8.8</td>
<td>14.0</td>
<td>135.4</td>
<td>163.1</td>
<td>29.5</td>
<td>152.6</td>
</tr>
</tbody>
</table>

1/ Estimated from reservoir operating study.
2/ Final supply plus return flows. Except for non-regulated Antelope River water flows, the basinette supply is 1.4 times the net new supply.
3/ Additional new basinette supply including return of winter return flows and use of spills as being below boundaries of Conservation District in Colorado. 
4/ Irreversible project supply from Pueblo River and Pecos Channel, exclusive of non-irrigating diversions and field exchange water.
5/ Spills at Pueblo basinette could spill from San Juan Basinette in years of high runoff.
6/ 6,000 a.f. of project C.P.A. water will be regulated in project reservoirs.
7/ 10,000 a.f. of project-industrial water (10,000 to Colorado Springs; 3,000 to Pueblo; 7,000 to valley towns).
8/ Estimated on 50% of project municipal total.
9/ Additional imports by Pueblo basinette possible by additional storage capacity in Pueblo Basinette basinette and by replacement capacity on the Western Flows.
10/ Antelope River water flows are being diverted for direct use would be shared in project reservoirs for common use.
Proposed Operating Procedures

All project operations will recognize and protect established rights having a priority date senior to those acquired for the project.

Integration of power and irrigation operations.--The project's hydroelectric system is planned for the maximum generation of firm energy. To accomplish this objective flows of the Arkansas River and west slope importations will be regulated in the enlarged Sugar Loaf and Twin Lakes Reservoirs. The regulated water flows will be released for the best generation of power and will in turn be available for direct use or reregulated in Pueblo Reservoir for release on demand of the irrigators. To initiate this plan of operation it will be necessary to build up an operating pool in the upper reservoirs during the early operating stages of the project. This procedure was discussed with the water users of the Arkansas Valley and their approval was obtained. At a meeting in Rocky Ford on February 22, 1949 the boards of directors of the Catlin, Highline, Rocky Ford, Holbrook, and Bessemer Ditches unanimously adopted the following motion:

That this entire group expresses a willingness to give hydroelectric power first priority on all imported water developed by the (Fryingpan-Arkansas) Project, this in order to build up an operating pool during the early states of the project, and also to permit the generation of maximum amount of firm power.

Identical motions were approved by the directors of the Fort Lyon Canal Company and the Twin Lakes Reservoir and Canal Company.

Municipal Water.--The needs for municipal and domestic water will have "first call" on the project water supplies. Delivery will be made at Canon City for the city of Colorado Springs. Delivery for Pueblo and the communities in the Arkansas Valley will be made at the Pueblo Reservoir. Storage may be in any of the project reservoirs--if in Pueblo Reservoir delivery to Colorado Springs can be met by exchange.

Irrigation.--Established rights to the use of Arkansas River water will be recognized and flows maintained in the river to satisfy these rights to the extent that they could be met from natural flow of the river.

Project water, available from imports or storage, to supplement natural flows will be distributed by the Conservancy District to the several irrigation companies in accordance with agreements reached with these companies within the Conservancy District. Deliveries above Pueblo Reservoir can be met by release from the upper reservoirs or by exchange with Pueblo Reservoir. Deliveries below Pueblo will be met by releases from Pueblo Reservoir.
Winter water stored in Pueblo Reservoir in lieu of winter irrigation will be available for delivery in accordance with agreements reached among the various companies and the Conservancy District. Storage of winter water will in part be accomplished through temporary use of flood control capacity in the reservoir. Water stored in this space will be evacuated prior to April 15 of each year. It may also be necessary to evacuate winter storage to provide capacity for project water. The project operation studies show that the few years when it would be necessary to spill stored winter water are years having ample water supply through the irrigation season.

Twin Lakes Reservoir and Canal Company.—Project plans contemplate the use and enlargement of the Twin Lakes Reservoir. Storage capacity in the project system equivalent to the existing 56,000 acre-feet in Twin Lakes Reservoir and an additional 54,000 acre-feet on a rental basis (a total of 110,000 acre-feet) would be allocated to use of the Twin Lakes Company. The availability of this capacity would permit the company to more fully exercise its decreed rights for diversion of water from the Roaring Fork drainage area and for storage of Lake Creek water. All water stored by the Twin Lakes Company under its decreed rights would be available to it on demand. Deliveries would be made from Pueblo Reservoir; however, the usual transportation charges would be assessed as though releases had been made from Twin Lakes Reservoir. Evaporation losses on the company's water would be computed as though storage were at the Twin Lakes site. The company would be charged a prorated share of reservoir operation and maintenance costs based on its existing Twin Lakes Reservoir capacity (56,000 acre-feet). A service charge on an annual use basis would also be made for regulation of the additional water supply developed by the Twin Lakes Reservoir and Canal Company in conjunction with the use of Fryingpan-Arkansas Project facilities including the additional 54,000 acre-feet of storage capacity allocated to the company's use.

Colorado Fuel and Iron Corporation.—The Sugar Loaf Reservoir of the Colorado Fuel and Iron Corporation will also be enlarged and become part of the project facilities. Storage capacity in the project system will be furnished to the C.F.&I., equivalent to its existing 17,000 acre-feet plus an additional 10,000 acre-feet on a rental basis. A proportionate allocated share of O & M costs will be paid by the company. Payment for use of the additional 10,000 acre-feet will be made on an annual use basis. Delivery of the company's water will be made on demand and at the heading of the Minnequa Canal on the Arkansas River. Transportation and evaporation losses will be charged as though storage and delivery were at the Sugar Loaf Reservoir site.
Operating Agreements and Accounting

The rather complicated water problems and operating criteria will necessitate full cooperation among the project water users. Formal agreements, either on a continuing or annual basis will be necessary to provide for distribution of project water supplies and to derive the maximum benefits to the Arkansas Valley. Recognition of the many problems involved, their solution and the negotiation of suitable agreements are responsibilities of the Conservancy District.

Complete daily records will be maintained by the Government reflecting use of water in the power system and storage in project reservoirs. The Conservancy District will also maintain complete daily records with respect to distribution of the project water supplies to the several users.

Resolution of interrelated problems involving private water rights, both within the Conservancy District and outside, all phases of project operations, and administration of stream flows by the State will require the highest degree of coordination between the Government, the Conservancy District, and the State.
### Acres of Irrigated and Non-Irrigated Land by Ditches or Diversion Within Southeastern Colorado Water Conservancy 1/

<table>
<thead>
<tr>
<th>Ditches</th>
<th>River Miles-Pueblo Dam</th>
<th>Total Class 1 &amp; 2 Acres</th>
<th>Total Irrigated Acres</th>
<th>Total Dry Acres</th>
<th>Total Class 6 Irrigated Acres</th>
<th>Total Irrigated Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bessemer</td>
<td>0.0</td>
<td>23,526</td>
<td>22,107</td>
<td>1,419</td>
<td>70</td>
<td>22,177</td>
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<tr>
<td>Excelsior</td>
<td>16.0</td>
<td>1,862</td>
<td>1,789</td>
<td>73</td>
<td>209</td>
<td>1,998</td>
</tr>
<tr>
<td>Collier</td>
<td>24.0</td>
<td>592</td>
<td>550</td>
<td>42</td>
<td>98</td>
<td>648</td>
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<tr>
<td>Colorado</td>
<td>28.5</td>
<td>43,009</td>
<td>34,745</td>
<td>8,264</td>
<td>9,044</td>
<td>43,789</td>
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<tr>
<td>Highline</td>
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<td>24,839</td>
<td>23,211</td>
<td>1,624</td>
<td>896</td>
<td>24,107</td>
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<tr>
<td>Oxford-Farmers</td>
<td>37.0</td>
<td>6,060</td>
<td>5,802</td>
<td>258</td>
<td>17</td>
<td>5,819</td>
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<tr>
<td>Otero</td>
<td>46.0</td>
<td>6,681</td>
<td>5,664</td>
<td>1,017</td>
<td>331</td>
<td>5,995</td>
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<tr>
<td>Catlin</td>
<td>52.0</td>
<td>19,329</td>
<td>18,479</td>
<td>850</td>
<td>281</td>
<td>18,760</td>
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<td>Holbrook</td>
<td>57.3</td>
<td>17,526</td>
<td>14,041</td>
<td>3,485</td>
<td>903</td>
<td>14,944</td>
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<td>Rocky Ford</td>
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<td>7,728</td>
<td>37</td>
<td>478</td>
<td>8,206</td>
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<tr>
<td>Fort Lyon</td>
<td>77.3</td>
<td>97,273</td>
<td>85,910</td>
<td>11,363</td>
<td>5,434</td>
<td>91,344</td>
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<td>Las Animas</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Consolidated,</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Town, Extension</td>
<td>92.8</td>
<td>7,860</td>
<td>7,027</td>
<td>833</td>
<td>1,614</td>
<td>8,641</td>
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<td><strong>Subtotal</strong></td>
<td></td>
<td>256,322</td>
<td>227,053</td>
<td>29,269</td>
<td>19,375</td>
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<td><strong>Subtotal</strong></td>
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<td></td>
<td></td>
<td></td>
<td>1,068 2/</td>
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<tr>
<td><strong>Area above</strong></td>
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<tr>
<td>Pueblo Dam</td>
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<td>12,538</td>
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<td><strong>Area-Fountain Creek</strong></td>
<td></td>
<td>12,805 3/</td>
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<td><strong>Total</strong></td>
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<td>280,597</td>
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<tr>
<td><strong>Rounded</strong></td>
<td></td>
<td>280,600</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

1/ Source: Supplement to Project Lands Appendix, Fryingpan Arkansas Project - August 26, 1963

2/ A portion of the Las Animas Consolidated, Town, Extension Ditches Service Area is not Within District Boundary. To make numbers fit, this is estimated to be 1068 acres.

3/ Not classified
1/ Data provided by Southeastern Colorado Water Conservancy District.

2/ 7,370.835 shares (15 percent) remain in agriculture. (11/21/88)

3/ 1 share to 10 acres.

4/ 1 share to 5 acres (assumed)

5/ 4973.12 shares are considered active.

6/ Las Animas Consolidated: 5586 shares
   Las Animas Extension: 2917 shares

7/ The assumed maximum annual demand for supplemental irrigation water is expressed in inches per acre at Pueblo Dam, the point of delivery for project water. The respective amounts for each entity were estimated somewhat arbitrarily using 1988 as an example of a year during which a number of factors, i.e., hydrologic, crop prices, cost of water, etc., generated the greatest use of project water since it has been available.

8/ The assumed maximum annual demand for supplemental irrigation water at Pueblo Dam expressed in units of 1000 acre-feet is estimated by multiplying the USBR irrigable acreage by the assumed inches per acre and dividing by 12.

   The display of these quantities as representing maximum annual demands by entity should not be interpreted by the district or its member entities that these demands may never be exceeded. Circumstances in any given year may create conditions such that one or several of the entities may request amounts of water greater than these assumed maximums.

9/ The assumed maximum demand for the Colorado Canal is estimated for 15 percent of the USBR acreage (43,009 X 0.15 X 0.75 = 4300). The 15 percent is the percentage of the total shares remaining in agriculture. If all the Colorado Canal were to remain in agriculture, the assumed maximum demand for water is estimated to be 32,200 acre-feet.
37-82-101. All water property of public.
37-82-102. Priority of right to spring water.
37-82-103. Appropriation of natural springs.
37-82-104. Not to impair vested rights.

37-82-101. All water property of public. All water originating in or flowing into this state, whether found on the surface or underground, has always been and is hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law.


I. General Consideration.
II. Right of Appropriation.
A. In General.
B. Necessity for Beneficial Use.
C. Nature of Right Acquired.

I. GENERAL CONSIDERATION.

Annotator's note. Since § 37-82-101 is similar to repealed § 148-2-1, C.R.S. 1963, § 147-2-1, CRS 53, and laws antecedent to CSA, C. 90, § 5, relevant cases construing these provisions have been included in the annotations to § 37-82-101.

Considering the history of Colorado, the nature of its soil and climate, its constitutional and legislative enactments, as well as the decisions of our courts, we have no hesitation in saying that our legislators used the term "irrigation" according to the common parlance of our people, in its special sense, as denoting the application of water to lands for the raising of agricultural crops and other products of the soil. Platte Water Co. v. Northern Colo. Irrigation Co., 12 Colo. 525, 21 P. 711 (1889).

The application of water to the growing of trees upon the streets of a city, or trees, shrubs, grasses, and the like, in public parks, is as much irrigation as the application of water to the growth of crops upon farm lands, and neither the farmer nor the municipality, using or seeking to use water from the same source, has any right superior to the other. City & County of Denver v. Brown, 56 Colo. 216, 138 P. 44 (1914).

Water diverted and used for the propagation of fish is devoted to a useful purpose and may be appropriated therefor. Faden v. Hubbell, 93 Colo. 358, 28 P.2d 247 (1933).

The former statute recognized two classes of appropriations for irrigations, one for ditches diverting water directly from the stream, and one for the storage of water, to be used subsequently. Handy Ditch Co. v. Greeley & Loveland Irrigation Co., 86 Colo. 197, 280 P. 481 (1929). See New Loveland & Greeley Land Co. v. Consolidated Home-Supply Ditch & Reservoir Co., 27 Colo. 525, 62 P. 366, 52 L.R.A. 266 (1900); Greeley & Loveland Irrigation Co. v. Huppe, 60 Colo. 535, 155 P. 386 (1916); Holbrook Irrigation Dist. v. Pt. Lyon Canal Co., 84 Colo. 174, 269 P. 574 (1928).

The impounding and piping of waters for the purpose of generating electricity to be sold as a commodity constitute a valid appropriation of waters under the constitution and laws of the state of Colorado, as they have been construed by the court of last resort of this state. Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (D. Colo. 1910). See Lamhona v. Bell, 18 Colo. 346, 32 P. 989, 20 L.R.A. 241 (1893); Schwab v. Beam, 86 F. 41 (D. Colo. 1898); Sternberger v. Section Mining Co., 45 Colo. 401, 102 P. 168 (1909).

A contractual right to make use of water on specified lands is far different from the "water right" acquired by original appropriation, diversion, and application to a beneficial use. Green v. Chaffee Ditch Co., 130 Colo. 91, 371 P.2d 775 (1962).

II. RIGHT OF APPROPRIATION.
A. In General.


The doctrine of appropriation for agriculture is evoked by the imperative necessity for artifi-
Appropriation and Use of Water

37-82-101

The right to water by prior appropriation was recognized by the first general assembly of the territory and such rights continued to be recognized during the entire territorial existence. Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 P. 235 (1891). See Platte Water Co. v. Northern Colo. Irrigation Co., 12 Colo. 525, 21 P. 711 (1889).

It has become thoroughly entrenched in our jurisprudence, through constitutional and statutory provisions, and by a uniform and unbroken line of judicial decisions. Comstock v. Larimer & Weld Reservoir Co., 58 Colo. 186, 145 P. 700, 1916 A. Ann. Cas. 416 (1914).

And it is said of the doctrine in this state that the common-law rule of continuous flow of natural streams is abolished, is so firmly established by the constitution, the statutes of the territory and the state, and by many decisions of the courts, that the supreme court declines to reopen or reconsider it, however interesting discussion thereof might otherwise be, and notwithstanding its importance.


Therefore, the right to appropriate water and put the same to beneficial use at any place in the state is no longer open to question.


An appropriation is the intent to take accompanied by some open physical demonstration of the intent. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

And the appropriation is, in legal contemplation, made when the act evidencing the intent is performed. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

Therefore, when the individual, by some open, physical demonstration, indicates an intent to take, for a valuable or beneficial use, and through such demonstration ultimately succeeds in applying the water to the use designated, there is an appropriation. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The required "first step" must consist of open work "on the land" in order that notice may be given to others of the intention of the appropriators.


But the requisite intent to appropriate does...
not have to precede or be contemporaneous with the acts which constitute the work on the land. What is required is that at some point in time the two requirements, the open physical demonstration and the requisite intent to appropriate, coexist. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).


River flow is as much affected by intercepting and diverting water, which otherwise would flow into it, as by directly withdrawing water from its channel. Peterson v. Reed, 149 Colo. 573, 369 P.2d 981 (1962).


River flow is as much affected by intercepting and diverting water, which otherwise would flow into it, as by directly withdrawing water from its channel. Peterson v. Reed, 149 Colo. 573, 369 P.2d 981 (1962).

And drainage and seepage waters tributary to a natural stream cannot be independently appropriated by intercepting such waters before they commingled with the stream. Peterson v. Reed, 149 Colo. 573, 369 P.2d 981 (1962).

Moreover, that the parties intercepted the waters of a drainage ditch before they emptied into a stream is immaterial where these waters were tributary to the stream and were subject to the prior appropriations thereon. Peterson v. Reed, 149 Colo. 573, 369 P.2d 981 (1962).

Also, it is immaterial that waters of a drainage ditch are characterized as "artificially developed" where the findings of the trial court determined such waters to be tributary to a natural stream, the presumption being that all flowing water finds its way to a stream. Peterson v. Reed, 149 Colo. 573, 369 P.2d 981 (1962).

B. Necessity for Beneficial Use.

An appropriation, to be valid, must be manifested by the successful application of the water to the beneficial use designed or accompanied by some open, physical demonstration of intent to take the same for such use. Yuncker v. Nichols, 1 Colo. 551 (1872); Schilling v. Rominger, 4 Colo. 100 (1878); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Thomas v. Guiraud, 6 Colo. 530 (1883); Larimer County Reservoir Co. v. People ex rel. Luthe, 8 Colo. 614, 9 P. 794 (1885); Platte Water Co. v. Northern Colo. Irrigation Co., 12 Colo. 525, 21 P. 711 (1889). See Woods v. Sargent, 43 Colo. 268, 95 P. 932 (1908); Comstock v. Larimer & Weld Reservoir Co., 58 Colo. 186, 145 P. 700, 1916A Ann. Cas. 416 (1914).

From the first, the court has recognized and emphasized the idea that a priority could only be legally acquired by the application of the water to some beneficial use. Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 P. 1028, 4 L.R.A. 767 (1899); Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 P. 1032, 36 Am. St. R. 259 (1892). Thus only by a diversion and beneficial use can a priority of right be acquired. Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 P. 1032, 36 Am. St. R. 259 (1892).

And in the absence of express statutes to the contrary, the first appropriator of water from a natural stream, for a beneficial purpose, has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation. Schilling v. Rominger, 4 Colo. 100 (1878); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).


And the measure of the appropriation does not depend alone upon the amount diverted and carried, but the amount which is applied to a beneficial use must also be considered. Woods v. Sargent, 43 Colo. 268, 95 P. 932 (1908).

Where all witnesses agreed that in planning for a reasonable municipal water supply provision should be made for an adequate supply in years of minimum runoff and maximum consumption, and evidence disclosed large expenditures in good faith effort to acquire unappropriated waters of the state for present and anticipated needs, a finding by the trial court of lack of need was erroneous. Metropolitan Sub. Water Users Ass'n v. Colorado River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961).
The right to water in this country by priority of appropriation is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313, 25 Am. St. R. 245 (1891); Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 P. 235 (1891).

But a corporation which under its charter has the exclusive right to divert the waters of a nonnavigable stream, and the exclusive privilege of using and controlling the same for mechanical, agricultural, mining, and city purposes, is entitled to such right to remain in abeyance for a long series of years, and thereafter assert the same to the exclusion of those who have in the meantime acquired rights to the use of such stream by actual appropriation and use, in pursuance of the general laws of the state. Platte Water Co. v. Northern Colorado Irrigation Co., 12 Colo. 525, 21 P. 711 (1889).

A priority has been declared a property right, and as such it is subject to sale and transfer. Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 P. 1032, 36 Am. St. R. 259 (1892).

A water thus acquired is not in any manner appurtenant to the land in connection with which it was acquired. Coffin v. Left Hand Ditch Co. (1882).

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The court has recognized and approved a doctrine that a priority could only be held by the application of the beneficial use. Farmers' High Reservoir Co. v. Southworth, 1 P. 1028, 4 L.R.A. 767 (1899); and & Canal Co. v. South Platte Co., 1, 30 P. 1032, 36 Am. St. R. 259 (1892).

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A priority has been declared a property right, and as such it is subject to sale and transfer. Ft. Morgan Land & Canal Co. v. South Platte Ditch Co., 18 Colo. 1, 30 P. 1032, 36 Am. St. R. 259 (1892). See Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313, 25 Am. St. R. 245 (1891). And water rights acquired by appropriation for purposes of irrigation in this state cannot be held to be inestimably annexed to the land in connection with which they were acquired. Even though under certain circumstances such rights may be considered appurtenant to the land they may be sold and conveyed separate and apart therefrom; and where such severance, sale and conveyance have taken place, as by the assignment and conveyance of the land, it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313, 25 Am. St. R. 245 (1891). And water rights acquired by appropriation for purposes of irrigation in this state cannot be held to be inestimably annexed to the land in connection with which they were acquired. Even though under certain circumstances such rights may be considered appurtenant to the land they may be sold and conveyed separate and apart therefrom; and where such severance, sale and conveyance have taken place, as by the assignment and conveyance of the land, it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313, 25 Am. St. R. 245 (1891).

And as beneficial use is the ultimate essential in the establishment of a water right, so it also is essential in the perpetuation of such right. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

But although a water right has attained to the dignity of real property, it cannot be said that it has attained to the dignity of an estate in fee or a freehold estate, it is still a possessory right, even after its consummation, and dependent on the continuous use of the water, and a failure to comply with this condition subjects the right to loss by abandonment. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

And as beneficial use is the ultimate essential in the establishment of a water right, so it also is essential in the perpetuation of such right, Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

An abandonment of property held by possessory title takes place instantly when the occupant deserts it without an intention of ever reclaiming it for himself, and careless of what there may become of it. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

And as beneficial use is the ultimate essential in the establishment of a water right, so it also is essential in the perpetuation of such right. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).
Where by clear and convincing evidence it is shown that for an unreasonable time available water has not been used, an intention to abandon may be inferred in the absence of proof of some fact or condition excusing such nonuse, the issue of intent in such instance becomes a question of fact for determination by the trial court from all the pertinent facts and surrounding circumstances, and where supported by competent evidence such finding will not be disturbed on review. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).


In common usage, "to abandon" means to forsake; give up wholly; quit; when applied to a possessory right, such as is a water right, it means to discontinue, desert, relinquish, surrender, vacate, or give up; its opposite is to occupy, keep, maintain, use, preserve, and protect, and in water and irrigation matters it has no special, mystical, or different meaning than that well and generally recognized in all instances where are involved legal rights, the preservation and continuation of which are dependent upon possession, use, or occupancy. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

That the life of such right terminates and that it goes out of existence upon abandonment is a principle so well recognized that citation of authority to support it is unnecessary, but in the absence of expressed declaration, the difficult question for determination is whether, at any time following its acquisition, the owner of the right decided to quit, surrender, or give it up. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

Although the intent of the party charged with abandoning a water right, ditch, or other works, is a necessary element to work an actual abandonment upon his part, the intent to abandon may be implied, and an actual abandonment decreed by the court from the acts of the appropriator or owner, or from his failure to act; and that, too, in the absence of any direct statement by him that he has abandoned the right, even in the face of declarations of the party charged, that he still owns the right and has not abandoned it, without any act of possession or user of the right by him, the court will declare the right to be abandoned, should the facts and circumstances in the case show that there was an actual abandonment. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).


And to rebut the presumption of abandonment arising from such long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

Mere "expressions of desire or hope or intent" in abandonment cases are insufficient excuse for nonuse of a water right. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

Nonuse of a water right may not be justified by a showing that the owner intended to sell the property, or that it was kept listed with real estate brokers. Speculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

And oral declarations of ownership, in the absence of showing of reasonable justification for nonuser, are insufficient to overcome the presumption of intent to abandon. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

Individuals in whom a prior right to the use of water is vested may lose such right by acquiescence in an adverse use thereof by another continued uninterruptedly for the statutory period. Greeley & Loveland Irrigation Co. v. McCloud, 140 Colo. 173, 342 P.2d 1045 (1959); Nesbitt v. Jones, 140 Colo. 412, 344 P.2d 949 (1959).

III. APPROPRIATION UNDER INSTANT SECTION.

This section was an express statutory recognition of utilization of lands from natural overflow as one means of appropriation, as in the flooding of meadows by natural overflow without the use of any artificial means whatever. Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093 (1909); Broad Run Inv. Co. v. Deuel & Snyder Imp. Co., 47 Colo. 573, 108 P. 755 (1910); Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (D. Colo. 1910).

This section included all lands in the immediate valley of the stream. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

It did not prohibit the diversion of water to the “detriment” of parties who might at some future period conclude to settle upon the


equiv. expressions of desire or hope or abandonment cases are insufficient nonuse of a water right. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

declarations of ownership, in the showing of reasonable justification, are insufficient to overcome the intent of the owner. Knapp v. Colorado River Water Conservation Dist., 131 Colo. 42, 279 P.2d 420 (1955).

s in whom a prior right to the use vested may lose such right by in adverse use thereof by continued uninterruptedly for the period. Greeley & Left Hand Irriga- tion Co. v. McCloughan, 140 Colo. 173, 342 P.2d 959 (1959); Nesbitt v. Jones, 140 Colo. 194 (1959).

Appropriation Under Instant Section.

was an express statutory utilization of lands from natural sources of water by means of appropriation, as in meadows by natural overflow or from any artificial means what- haveys Tunnel & Mining Co. v. Colo. 524, 105 P. 1093 (1909); av. Colo. v. Deuel & Snyder Imp. 573, 108 P. 755 (1910); Cascade Empire Water & Power Co., 181 Colo. 1910).

included all lands in the vicinity of the stream. Coffin v. Left "o" 6 Colo. 443 (1882).

prohibit the diversion of water to the "o" of parties who might at some time conclude to settle upon the stream; nor was the general assembly legislating with a view to preserving in such stream sufficient water for the "use" of set-

37-82-102. Priority of right to spring water. All ditches constructed for the purpose of utilizing the waste, seepage, or spring waters of the state shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; but the person upon whose land the seepage or spring waters first arise shall have the prior right to such waters if capable of being used upon his lands.


I. General Consideration.
II. Right to Seepage or Spring Water.
III. Water Tributary to Natural Streams.

I. GENERAL CONSIDERATION.


The validity of this section, so far as it relates to water which is in no sense tributary to a stream, has never been denied by the courts and is not now disputed. Colorado & Utah Coal Co. v. Walter, 75 Colo. 489, 226 P. 864 (1924).

This section does not apply to a ditch built to catch the surface drainage from the irrigation of adjoining lands. Burkart v. Meiberg, 37 Colo. 187, 86 P. 98, 119 Am. St. R. 279, 6 L.R.A. (n.s.) 1104 (1906).

Where and whereon the owner of land upon which is located a spring, the water of which he uses for irrigation and stock purposes, has no natural stream; nor was the general assembly legislating with a view to preserving in such stream sufficient water for the "use" of such lands who might never come, and consequently never have use thereof. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

But, the owner of land upon which is located a spring, the water of which he uses for irrigation and stock purposes, has the first and prior right to its use, it not being tributary to, or forming a part of any natural stream. Haver v. Matonock, 79 Colo. 194, 244 P. 914 (1926); Faden v. Hubbell, 93 Colo. 358, 28 P.2d 247 (1933).


Where seepage water, which plaintiff claims to have diverted, if left to itself, would never have reached a natural stream, any appropriation of the water which plaintiff’s testator might have made was subject to the superior right of the owner of the land on which the
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37-82-106. Right to reuse of imported water. Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. Nothing in this section shall be construed to impair or diminish any water right which has become vested.


Even without statute, user of imported water has rights of re-use, successive use, and disposition of foreign water, subject to contrary contractual obligations. City & County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

Because, in order to minimize amount of water removed from western Colorado, eastern slope importers should, to maximum extent feasible, reuse and make successive uses of foreign water. City & County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).


"Right of disposition" means right to sell, lease, exchange or otherwise dispose of effluent containing foreign water after distribution through importer's water system and collection in its sewer system. City & County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

Importer of water has burden of demonstrating identity of imported water when establishing rights of re-use, successive use and disposition. City & County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

When importer delivers water to customer tap, it does not lose dominion over water later returning to its sewer. City & County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

Appropriators on stream have no vested right to continuance of importation of foreign water which another has brought to watershed. City & County of Denver v. Fulton Irrigating Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

ARTICLE 83
Exchange of Water

37-83-101. Transfer from one stream to another.

37-83-104. Reservoirs and ditches may exchange.


37-83-105. Owner may loan water right.

37-83-103. Division engineer to keep record.

37-83-101. Transfer from one stream to another. Whenever any person or company diverts water from one public stream and turns it into another public stream, such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer.

Source: L. 1897, p. 176, § 1; R. S. 08, § 3222; C. L. § 1702; CSA, C. 90, § 100; CRS 53, § 147-6-1; C.R.S. 1963, § 148-6-1.

Law review. For article, "Foreign Water in Colorado — The City's Right to Recapture
37-81-104. Fee for diversion - fund created. (1) To effectuate the purposes of this article, the general assembly hereby authorizes a fee of fifty dollars per acre-foot to be assessed and collected by the state engineer on water diverted, carried, stored, or transported in this state for beneficial use outside this state measured at the point of release from storage or at the point of diversion.

(2) All moneys collected pursuant to subsection (1) of this section shall be credited to the water diversion fund, which fund is hereby created. The general assembly shall annually appropriate all moneys in said fund for water projects for the state. Said appropriation shall be consistent with part 13 of article 3 of title 2, C.R.S.


ARTICLE 82
Appropriation and Use of Water

37-82-101. Waters of natural surface streams subject to appropriation.

37-82-106. Right to reuse of imported water.

37-82-101. Waters of natural surface streams subject to appropriation. (1) The water of every natural stream, as referred to in sections 5 and 6 of article XVI of the state constitution, includes all the water occurring within the state of Colorado which is in or tributary to a natural surface stream but does not include nontributary ground water as that term is defined in section 37-90-103. All nontributary ground water shall be subject to such
administration and use as the general assembly may provide by law. Such nontributary waters, when released from the dominion of the user, become a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority.

(2) A stream system which arises as a natural surface stream and, as a natural or man-induced phenomenon, terminates within the state of Colorado through naturally occurring evaporation and transpiration of its waters, together with its underflow and tributary waters, is a natural surface stream subject to appropriation as provided in subsection (1) of this section.


37-82-105. Interference with flow - damages.


37-82-106. Right to reuse of imported water. (1) Whenever an appropriator has lawfully introduced foreign water into a stream system from an unconnected stream system, such appropriator may make a succession of uses of such water by exchange or otherwise to the extent that its volume can be distinguished from the volume of the streams into which it is introduced. Nothing in this section shall be construed to impair or diminish any water right which has become vested.

(2) To the extent that there exists a right to make a succession of uses of foreign, nontributary, or other developed water, such right is personal to the developer or his successors, lessees, contractors, or assigns. Such water, when released from the dominion of the user, becomes a part of the natural surface stream where released, subject to water rights on such stream in the order of their priority, but nothing in this subsection (2) shall affect the rights of the developer or his successors or assigns with respect to such foreign, nontributary, or developed water, nor shall dominion over such water be lost to the owner or user thereof by reason of use of a natural water course in the process of carrying such water to the place of its use or successive use.

Source: Amended, L. 79, p. 1366, § 2.

Memorandum

To: Assistant Secretary - Land and Water Resources

From: Commissioner (Sgd) R. Keith Higginson

Subject: Irrigation Contracting Policies

On January 10, 1979, you approved certain irrigation contracting policies set forth in my memorandum of December 29, 1978 (copy enclosed). Since that time, several events have prompted me to reassess these policies.

My policies, as expressed in my December 29, 1978, memorandum, were designed to implement a uniform approach to irrigation contracting practices throughout the Service. However, deviations from a few of the most important policies have occurred in contract negotiations with the Westlands Water District and the formulation of a comprehensive ratesetting policy for the Central Valley Project (CVP). These areas of concern include (1) establishment of water rates no lower than the irrigators' ability to pay and (2) additional water deliveries to long-term contractors only through interim water service contracts.

The ratesetting procedures for the Westlands negotiations and those being contemplated for the entire CVP are premised on establishing an irrigation water rate equal to the full cost of service (excluding interest) or the payment capacity of the contractor, whichever is less. I feel that it is vital to maintain a degree of consistency among Service projects. Therefore, the ratesetting precedent set for this major project, the CVP, should be extended to other projects.

Historically, irrigators have not had sufficient payment capacity to repay the full capital costs associated with irrigation water supply, conveyance, and drainage works. Assistance from surplus power and municipal and industrial (M&I) revenues has been required to repay those capital costs beyond the irrigators' ability to pay. In such situations, the irrigators must pay all operation and maintenance costs and 100 percent of the residual payment capacity is utilized to repay a portion of the allocable capital costs. Therefore, a policy of setting water rates and annual payment obligations based on the lesser of full cost of service or payment capacity is the reality for many existing projects and probably will be the reality for the majority of future irrigation projects.
The proposed water service contract with Westlands allows provision of water, beyond the maximum specified in the contract, at the rates specified for firm water service. In other words, it does not contemplate that temporary or interim water service contracts need be executed to furnish water in excess of 1,150,000 acre-feet. I believe that as long as we have the firm rate-setting policy specified above and adjustable rates, there is no particular need to provide additional water service through a short-term contract rather than under a long-term, permanent contract.

Your concurrence with these policies will also influence the Service's policy on ratesetting and repayment of the M&I functions of projects. We expect to have a comprehensive analysis and policy established for M&I contracting in the next few months.

I request your concurrence with the following contracting policies which represent a revision of those presented in my December 29, 1978, memorandum. First, irrigation water rates will be established and adjusted to recover the full cost of service (based on the authorized repayment period) or the contractor's payment capacity, whichever is less. Second, service of surplus water, beyond the maximum specified in a long-term water service contract, may be made available pursuant to terms and conditions of said long-term contract instead of under an additional temporary contract.

Enclosure

(SGD) DANIEL P. BEARD
Assistant Secretary - Land and Water Resources
Concur:

12 AUG 1980
Date.

bc: Secretary's Reading Files--LWP (2)
Assistant Secretary - LW
Regional Director, FN, MP, UC, LC, UM, LM, SW
W.O. Code 180, 700
(v/o enclosure)

Note to bc's: Please place this in section II of the loose-leaf policy book sent to you on February 26, 1980.

IN REPLY REFER TO 740.

IN REPLY REFER TO 740.

IN REPLY REFER TO 740.

Memorandum

To: Regional Director, PN, MP, UC, LC, SW, UM, LM

From: Commissioner [Sgd] R. Keith Higginson

Subject: Irrigation Contracting Policies

I am hereby directing that the following policies and procedures be used in negotiating and proposing new, amendatory, or temporary irrigation water service and repayment contracts. In many cases these are a restatement of long–standing Reclamation policies that have, for one reason or another, not been uniformly implemented throughout the regions. Other policies are new and represent a tighter reading of the requirements of Reclamation law. However, it should be understood that the "ability to pay" concept remains the basic determinant of repayment and water service rates as it has in the past.

Because of the diverse methods now being employed by various regions in contracting for various services, it is expected that some minor revisions in standard contract language will be required to meet some of these requirements. I anticipate that there will be very few cases where exceptions to these policy guidelines will be necessary. Any such cases should be brought to my attention only after a good faith effort to comply with the guidelines has been made. In no instances will exception be made to the policy requirement that beneficiaries repay all operation, maintenance, and replacement costs and that water service contracts contain a 5-year rate adjustment clause.

A. All Contracts

All contracts shall refer specifically to and expressly incorporate by reference the Act(s) of Congress which authorize the construction of facilities and delivery of water provided for in the contract and all other relevant provisions of Reclamation law.

B. Irrigation Water Service Contracts

1. All new long-term water service contracts negotiated pursuant to section 9(e) of the Reclamation Project Act of 1939
or other water service contracting authority shall contain provisions requiring full payment of actual operation, maintenance, and replacement (OM&R) costs in advance of water delivery for said year. The advance payment of OM&R costs will be adjusted to actual costs in the subsequent annual OM&R billing. In addition, all new irrigation water service contracts shall contain provision for periodic review and adjustment of the rate for repayment of capital costs assigned to irrigation. Such rate will be included in all new contracts at the date of execution. The first adjustment of such rate will be at the first delivery of water, if more than 5 years after execution of the contract. Otherwise, adjustment will be 5 years after execution of the contract, and every 5 years thereafter, but synchronized with the regular 5-year review schedule of a given project, if applicable. All contracts containing provisions for water service shall include the rate adjustment clause described above. The original rate, and any subsequent adjustments, shall be no lower than the water users' ability to pay at the time the rate is set or adjusted. Payment capacity studies shall be confined to an area no larger than the service area of a unit (i.e., San Luis Unit, Bonneville Unit) within larger integrated projects or the project service area of smaller projects (i.e., Narrows, Dallas Creek). Where lands in a unit vary significantly by service areas (i.e., Garrison Diversion Unit); separate payment capacity studies will be done for each area.

2. The contingency allowance presently used in some regions for lowering payment capacity as an inducement to contract for water services has been determined to be unjustified. Under no circumstances will contingency reductions be made in computing payment capacity. Bureau procedures will be revised accordingly.

3. Water service contracts shall not authorize water deliveries in excess of the amounts specified by the feasibility report or authorizing act governing the project in question, and may authorize smaller water deliveries where that would promote conservation and more efficient use of water, and be consistent with applicable congressional directives. Either specific numbers or express reference to the amounts in the feasibility report or authorizing act shall be stated in the contract. Unless specifically provided in a long-term water service contract presently in force, contractors shall not receive a water supply in excess of that specified in the contract except under interim contract arrangements specified in item D of this memorandum. However, contracts shall reserve the right of the Federal Government to reduce water deliveries in dry and critical years.
4. In no case shall water rates in long-term contracts be adjusted to compensate water districts for funds contributed under the Contributed Funds Act to accelerate project construction. Bureau instructions will be revised to clearly prohibit such rate adjustments (including adjustments in ability to pay or water rate) to reflect the added expense to the district or water user to repay a loan, bond issue, or other means of financing a contribution to project construction.

5. Executed water service contracts are required prior to delivery of water from existing projects including those under construction. Executed contracts for water service from projects not under construction are required prior to start of construction.

C. **Irrigation Repayment Contracts**

1. Repayment contracts negotiated under section 9(d) of the Reclamation Project Act of 1939 or other repayment authority shall contain maps (attached to and expressly made a part of the contract by the text) which clearly define and designate the scope of the proposed works the United States is obligated to construct. The contract shall also specifically state the estimated cost (which will serve as a firm ceiling beyond which no obligation exists) and, in the case of distribution system repayment contracts, the number of acres to be served (which will also serve as a firm ceiling). Once executed, the terms in the repayment contract must be adhered to. Any changes in costs, system design, or increase in acreage to be served requires an amendatory contract, which shall be signed and executed prior to further construction. If such changes affect the cost ceiling, this office and the office of the Assistant Secretary - Land and Water Resources shall be informed immediately following Bureau knowledge of this fact by means of a written statement specifying proposed design changes, changes in cost estimates, reason for changes in the original contract, and other pertinent information. Without exception, decisions on amendatory contracts will be made only after thorough review and approval by this office, the office of the Assistant Secretary - Land and Water Resources, and the Solicitor.

2. Where a project is authorized to provide supplemental water service, contract terms shall provide for commencement of repayment at the end of the first growing season in which project water is used. A short development period will be allowed, if
necessary, on all lands not heretofore irrigated, including blocks of land not heretofore irrigated on projects authorized to provide both supplemental water and water to lands not heretofore irrigated. Development periods will be approved by the Secretary.

3. Executed repayment contracts with irrigation districts are required prior to commencement of construction of irrigation features of a Reclamation project.

4. Unless otherwise specified by law, contracts for repayment of distribution system facilities for the sole use of a particular water district must expressly recover all Federal costs (without interest) associated with the construction of such facilities. Contracts which do not provide for full repayment of such facilities will not be approved by this office unless the authorizing act specifically provides for allocation of a portion of the costs for repayment by other project users (i.e., power, municipal, and industrial).

5. Repayment contracts shall not obligate the United States to construct facilities that are not specified either in the authorizing statute or by reference in the authorizing statute to a specific feasibility report or as otherwise clearly authorized by the Congress. Repayment contracts shall not obligate the Federal Government to make expenditures beyond that authorized specifically by Congress in the authorizing statute. In any case, where the estimate of total Federal obligations exceeds the authorized cost ceiling as indexed for inflation, contracts will not be approved until adequate authority has been provided by the Congress.

6. Operating agreements, letters of intent to repay, or other pledges shall not be used as substitutes for firm repayment contract terms.

D. Interim Water Service Contracts

1. Regardless of payment capacity of the contractor, interim contract rates shall be sufficient to recover the actual costs of operation, maintenance, and replacement (including pumping power), and the project's (or unit's or division's) average share of capital
costs allocated to irrigation. The practice of using "postage stamp" rates (rates based on the canal or other facility from which water service deliveries will be made) shall be discontinued.

2. Where payment capacity studies indicate that the contractor has the ability to pay a water rate greater than that provided in a long-term contract between the contractor and the United States, and where no rate adjustment clause exists in the long-term contract, interim contracts shall be sufficient to recover—in addition to the cost of interim water service—that portion of the current cost (including capital) of deliveries of all water to the contractor not being recovered under the long-term contract. As an alternative, water may be delivered under an interim contract at a rate that covers only the cost of interim water services provided that the contractor amends its existing long-term contract with the United States to include the rate adjustment specified in paragraph 1 above.

3. Interim water service contracts with water districts having existing long-term water service or repayment contracts shall not substitute for those contracts in authorizing delivery of water. Necessary changes in long-term contracts shall be in the form of amendatory long-term contracts.

4. Any interim contracts providing for water service in excess of 2,000 acre-feet shall be reviewed by the Washington office of the Bureau of Reclamation. Interim contracts providing for amounts greater than 10,000 acre-feet shall be reviewed by the Washington office of the Bureau of Reclamation, the office of the Solicitor, and the office of the Assistant Secretary—Land and Water Resources. Interim contracts extending beyond 1 year will be reviewed by the office of the Assistant Secretary—Land and Water Resources. Each region shall prepare a report for the Secretary, annually, which identifies all interim contracts executed during the calendar year and which summarizes the terms of each contract; e.g., water rate, water quantity, length of contract and purpose of contract. The
Washington office of the Bureau of Reclamation will consolidate that report and submit it to the Secretary on or before December 31 of each year.

I Concur:

(SGD) Guy R. Martin
Assistant Secretary - Land and Water Resources

JAN 10 1979

bc: Secretary's Reading Files--RECLAMATION (2)
Assistant Secretary - LW
Assistant Secretary - Program, Budget & Administration
Solicitor
Director, Office of Management and Budget
Chief, Division of Management and Support, E&R Center, Denver, Colorado
Chief, Division of O&M Technical Services, E&R Center, Denver, Colorado
Washington Office Manager

LBR:RK Higginson/R Lane/F Ellis:ks:6/16/78:x5673
Revised:LBR:RK Higginson/R Lane/F Ellis:rh:6/20/78:x5673
Revised:LBR:J Leshy/F Ellis:ks:7/24/78:x5673
Retyped:LBR:F Ellis:ks:8/23/78:x5673
Revised:LBR:RK Higginson:meh:12/15/78:5673
Vydec D-2/A-12-16 and 23
February 22, 1985

Identical letters to all individuals who have not yet returned a form into us.

They say the third time is the charm, and I am certainly hoping that adage proves true in this instance. I speak of the absolute importance of getting you to complete the necessary Report Forms required under the Reclamation Reform Act of 1982, which was passed by the Congress of the United States, and related to agricultural water.

I am certainly pleased with the positive response we have received from the majority of the landowners under the Otero Ditch, and if you and the 12 other landholders who have not responded will do so, we will have 100%. The Board of Directors of the District have done everything they possibly can by amending our Repayment Contract to increase the acreage covered from 320 to 960, and to exempt those farming under 40 acres. We have also found from those who have completed their forms, that they do not object to having their lands recorded, and also that the information requested is not that difficult.

It is absolutely essential that we receive your form before March 10, otherwise it will be necessary that we work with the Otero Ditch Company in the delivery of Project water and Winter Stored water, to assure that you receive only your decreed water. This will complicate the management procedure for your company, and we would like to avoid that if at all possible. We certainly stand ready to work with you if you would call, and my personal hope is that the Arkansas Valley in Colorado will be one of the 100% Districts in the Western United States.

Very sincerely,

Charles L. Thomson
General Manager

CLT/mb

sc: Board of Directors, Southeastern Colorado Water Conservancy District
Mr. Raymond H. Willms, Project Manager, Fryingpan-Arkansas Project
Mr. Max Dutton, President, Otero Ditch Company